



1 Broadway Center, Schenectady, New York 12305

September 9, 2019

T. McElwee
DEPT MR 77997
411A Highland Avenue
Somerville, Massachusetts 02144-2516

Dear Sir or Madam:

This correspondence serves as the determination of your appeal, dated August 23, 2019 and received by the N.Y.S. Gaming Commission on August 28, 2019, concerning the August 20, 2019 denial of your July 26, 2019 request to access certain records pursuant to the Freedom of Information Law (FOIL).

On July 26, 2019, you requested the following:

The most recent version of the Commission's list of licensed casino vendors and pending applicants for casino vendors' licenses, pursuant to 9 CRR-NY 5307 ("Vendor Licensing and Registration."); Commission's most recent list of licensed junkets, junket enterprises and junket representatives pursuant to 9 CRR-NY 5308 ("Junket Operator Licensing"); the most recent version of the Commission's Patron Exclusion List pursuant to 9 CRR-NY 5327 ("Excluded Persons").

On August 20, 2019, Commission Records Access Officer Kristi Alois denied your request stating:

The New York State Gaming Commission does not have responsive records to the first two portions of your request. The last portion of your request is denied under the exemption of New York Public Officers Law §87(2)(b). New York Public Officers Law §87(2)(b) states that an agency has the discretion to deny public access to records which "if disclosed would constitute an unwarranted invasion of personal privacy."

In your FOIL Appeal dated August 23, 2019, you wrote:

I must express that I find the claim that there are no lists of licensed casino vendors or junket operators dubious, given that the Commission exists to review qualifications of licenses. I find it implausible that the Commission could perform this task without producing a basic inventory of applicants, those who are accepted and those rejected.

Access to Certain Casino Vendor and Junket Records

In your request, you sought a variety of specific lists (of licensed casino vendors and pending applicants for casino vendors' licenses, licensed junkets, junket enterprises and junket representatives). The Commission's Records Access Officer replied that no responsive records existed. The Commission's response was not predicated on any exclusionary criteria, rather the denial of access was due to record non-existence. The existence of records is not an appealable matter.

Regardless, the denial of access to these records, which was apparently based on a lack of their tangible existence, was inappropriate.

The FOIL pertains to existing records. The law does not require an agency to create a record in response to a request. N.Y. Public Officers Law § 89(3). The term "record" is, however, expansively defined to include:

"any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

N.Y. Public Officers Law § 86(4)

If information sought is maintained in some physical form, it would constitute a "record," subject to rights of access conferred by FOIL. The definition of "record," however, specifically references computer tapes and discs. Courts have held that as information is increasingly being stored in computers, access to such data should not be restricted merely because it is not in printed form. See generally, Babigian v. Evans, 427 NYS 2d 688, 691 (1980); aff'd 97 AD 2d 992 (1983); see also, Szikszay v. Buelow, 436 NYS 2d 558 (1981).

When information is maintained electronically, it may be available under FOIL if it is readily retrievable by means of existing computer programs. Under such a circumstance, an agency would merely be retrieving data, with disclosure accomplished either by printing out the data or duplicating the data on another storage medium. If the information sought can be retrieved from a computer or other storage medium only by means of new programming or the alteration of existing programs, then those steps would be the equivalent of creating a new record. As previously mentioned, the law does not require an agency to create a record.

A re-examination of the requested information finds that no tangible responsive document exists, but that retrieval of the requested information would not require reprogramming or development of new programs. Accordingly, the denial of access to the requested information is reversed, and the Commission is ordered to provide, within five business days, a responsive listing of licensed casino vendors, pending applicants for casino vendors' licenses, and a list of licensed junkets, junket enterprises and junket representatives.

Access to Excluded Persons Records

Your third requested item regarded "the most recent version of the Commission's Patron Exclusion List pursuant to 9 CRR-NY § 5327." Here, the Commission's Records Access Officer denied access under the exemption of N.Y. Public Officers Law §87(2)(b), which states that an agency has the discretion to deny public access to records which "if disclosed would constitute an unwarranted invasion of personal privacy."

This denial pursuant to the § 87(2)(b) exemption was inappropriate.

The statutory basis for Commission-ordered exclusion is found at N.Y. Racing, Pari-Mutuel Wagering and Breeding Law § 1342, Required exclusion of certain persons. This section requires the Commission to provide, by regulation, for the establishment of a list of persons who are to be excluded or ejected from any licensed gaming facility. This statute contains several important due process safeguards, including service of notice of intention to exclude and the opportunity for a hearing for such intended excluded person. N.Y. Racing, Pari-Mutuel Wagering and Breeding Law § 1342.5. An individual may also be summarily preliminarily placed on an exclusion list, pending completion of a hearing on the petition for exclusion. N.Y. Racing, Pari-Mutuel Wagering and Breeding Law § 1342.7.

I have reviewed both the Commission Secretary's Hearing Index and minutes of each Commission meeting conducted since the establishment of the regulation governing exclusion based on Racing Law § 1342 and 9 NYCRR § 5327 and found no such action

has been taken. Accordingly, there is no record to produce. Should the processes outlined in Racing Law § 1342 and 9 NYCRR § 5327 be utilized, such names of excluded persons are properly the subject of public disclosure in accordance with 9 NYCRR § 5327.1(a) which you correctly note requires the Commission maintain such list on its website.

I note that in your FOIL Appeal dated August 23, 2019, you wrote that you intended to clarify your request regarding excluded persons:

I am NOT requested [sic] any list of persons who have self-excluded for reasons of mental health or their own preference.

Self-exclusion is governed by Regulations apart from Commission-ordered exclusion, 9 NYCRR Part 5400 and 9 NYCRR § 5327 respectively. Given your initial inquiry specifically referenced 9 NYCRR § 5327, I assume your attempt to provide clarifying language was misguided and does not modify your request to seek information relative to self-excluded persons. In any regard, material regarding self-excluded persons would have been appropriately denied under the exemption of N.Y. Public Officers Law § 87(2)(b) which provides that an agency has the discretion to deny public access to records which "if disclosed would constitute an unwarranted invasion of personal privacy."



Robert Williams
Public Records Access Appeals Officer

Copies to:

Committee on Open Government
Kristi Alois, Records Access Officer
Kristen Buckley, Acting Secretary